in support of the right of the State to comment upon the failure of appellant to testify.

Appellant contended that although there is no specific provision in the United States Constitution granting in express words this right to the accused in a criminal trial in a state court, the right is nevertheless guaranteed by the Due Process Clause of Section 1 of the Fourteenth Amendment. He conceded that the Supreme Court had held that the Fourteenth Amendment does not automatically protect against infringement by the State of the rights included in the first eight amendments to the Constitution of the United States, which are protected against infringement by the federal government. *Palko* v. *Connecticut*, 302 U.S. 319, 323-324; *Knapp* v. *Schweitzer*, 357 U.S. 371, note 5 at p. 378, rehearing denied, 358 U.S. 860. It was also recognized that the Supreme Court had specifically ruled that the privilege against self-incrimination granted by the Fifth Amendment was not safeguarded against state action by the Fourteenth Amendment. *Twining* v. *New Jersey*, supra, 211 U.S. 78; *Adamson* v. *California*, supra, 332 U.S. 46; *Cohen* v. *Hurley*, 366 U.S. 117, 127-128, rehearing denied, 374 U.S. 857; *Knapp* v. *Schweitzer*, supra, 357 U.S. 371, 374-375. Appellant's argument was that recent decisions of the Supreme Court indicated that the [fol. 94] ruling with respect to self-incrimination would be reconsidered and that the Court would rule that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states.

On June 15, 1964, the day before the oral argument of this appeal, the Supreme Court in *Malloy* v. *Hogan*, 378 U.S. 1, reconsidered its previous rulings and held that the Fifth Amendment's exception from self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states.

Appellee points out in a supplemental brief that in the *Malloy* case the accused was punished for contempt of court for refusing to answer questions on the ground that it might tend to incriminate him, while in the present case the appellant was not called upon to testify or to answer any

questions. We find no merit in this factual distinction. As pointed out hereinabove, the protection against self-incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution.

The ruling in the *Malloy* case is controlling. *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, E.D. La., affirmed, 365 U.S. 569.

The order of the District Court is set aside and the case remanded to the District Court for further proceedings consistent with the views expressed herein.

[File endorsement omitted]

[fol. 95]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUDGMENT—Filed November 10, 1964

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby set aside and the case remanded to the District Court for further proceedings consistent with the opinion.

It is further ordered that Relator-Appellant recover from Respondent-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court. Carl W. Reuss, Clerk.

[fol. 96] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 97]

SUPREME COURT OF THE UNITED STATES

No. 877, October Term, 1964

DAN TEHAN, Sheriff of Hamilton County, Ohio, Petitioner,

v.

UNITED STATES ex rel. EDGAR I. SHOTT, JR.

ORDER ALLOWING CERTIORARI—May 24, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted and the case is placed on the summary calendar. The parties are requested to brief and argue the question of the retroactivity of the doctrine announced in Griffin v. California, No. 202, October Term, 1964, decided by this Court on April 28, 1965.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas dissents, being of the view that the case should be remanded to the District Court for a finding on allegation that respondent at the trial waived any objection to the comment made on his failure to testify.

The Chief Justice took no part in the consideration or decision of this petition.